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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

BRIEF OF AMERICAN NATIONAL STANDARDS INSTITUTE, INCORPORATED AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
A. Identification of Amicus Curiae	2
B. Impact of Lower Court Decision Upon Amicus Curiae	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	7

TABLE OF AUTHORITIES

PAGE

Cases

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 4

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 4

Truck Drivers' Local No. 421 v. *United States*, 128 F.2d 227 (8th Cir. 1942) 6

United States v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) 6

United States v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 6

Statutes

Internal Revenue Code § 501(c)(3) 2

Clayton Act, Section 4, 15 U.S.C. § 15 4

Other Authorities

II P. Areeda & D. Turner, *Antitrust Law* (1978) 4

Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Texas L. Rev. 1329 (1978) 2

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The American National Standards Institute, Incorporated ("ANSI") respectfully submits this brief as *amicus curiae* in support of the petition filed by the American Society of Mechanical Engineers, Inc. ("ASME") for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on November 24, 1980. The filing of this brief has been consented to by both parties.

INTEREST OF AMICUS CURIAE

A. Identification of Amicus Curiae

ANSI is a federation of standards-developing and standards-using organizations founded in 1918 to coordinate the development of national standards.* Presently, over 900 companies and 200 trade, technical, scientific, professional, labor, governmental, and consumer organizations are members of ANSI, including ASME.**

Standards represent an important method of information transfer benefiting business, government, and the public at large. In most countries, government occupies the leading role in the formulation and promulgation of standards. In the United States, however, standards are developed and maintained largely through the efforts of the private sector. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health,* 56 Texas L. Rev. 1329, 1338 (1978).

In the past ten years, ANSI has approved and published 30,000 standards actions. Pursuant to ANSI procedures, standards are submitted for approval after development under a national consensus system, which affords to all affected parties the right to participate and accords effective private due process, including the right of appeal.

ANSI itself does not write standards. Rather, organizations and individuals submit standards to ANSI for approval. ANSI then conducts independent verification of the adequacy of consensus, again according an opportunity to participate to substantially affected interests. If a particular standard is found to enjoy consensus, it is adopted and published by ANSI, the sponsoring organization, or both, and is formally designated an

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* Charter members of ANSI included the five then-leading American engineering societies as well as the Departments of War, Navy, and Commerce.

** Like petitioner ASME, ANSI is a non-profit scientific organization exempted from federal taxation under Section 501(c)(3) of the Internal Revenue Code.

American National Standard. Approximately two-thirds of ANSI's income is derived from the sale of standards publications and one-third from dues of members.

The benefits accruing to society from the development and publication of voluntary standards are well established. While the voluntary standards process in the United States is non-industry specific and enormously complex, it is highly efficient and leads the world in technical standing.

The system works solely by reason of the considerable time, effort, and talent voluntarily devoted to the standards programs of ANSI's members. Without these contributions, the voluntary standardization needs of the Nation could not be satisfied. It is fair to conclude that, should voluntary standardization be unduly impaired by a doctrine of vicarious antitrust liability, the resulting costs to the economy, and to society as a whole, would be great.

B. Impact of Lower Court Decision Upon Amicus Curiae

ANSI has a vital interest in seeking review of the decision of the Court of Appeals, since the voluntary standards system that it has long sought to foster and coordinate is wholly reliant upon the spirit of voluntarism exhibited by its constituent members. In the face of a rule of vicarious liability premised on "unintentional" (negligent) "participation" in an antitrust conspiracy, the obvious response of the organizations through which these volunteers work will be to decline to devote their considerable efforts and skills to standards activities, thus undermining a system that has served the Nation well.

STATEMENT OF THE CASE

ANSI adopts the statement of the case set out in the petition of petitioner ASME.

REASONS FOR GRANTING THE WRIT

ANSI agrees fully with the reasoning contained in the petition filed by ASME. This brief will simply highlight certain erroneous legal and policy conclusions reached by the Court of Appeals.

(1) In fashioning a rule of vicarious liability based on "apparent authority," the Court of Appeals has lost sight of the crucial relationship between accepted principles of antitrust liability and the nature of the treble damages provision. The treble damages remedy provided in Section 4 of the Clayton Act performs a dual function — it is both remedial and punitive. *See generally Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977). Because the Clayton Act's punitive function is seriously justified only in terms of its deterrent effect, rules of antitrust liability should not work an unjust penalty upon unwitting objects of a conspiracy. As Professors Phillip Areeda and Donald Turner have observed:

> It must be recognized . . . that treble damages can be an embarrassment to antitrust policy . . . . [T]he common law's usual discomfort with imposing unforeseen liability is greatly exacerbated when compensatory damages are automatically trebled. A defendant might reasonably suppose that he is complying with the antitrust laws, only to discover that he was mistaken initially or that the law has changed in the meantime.

II P. Areeda & D. Turner, *Antitrust Law*, § 331b2, at 150 (1978). The Court of Appeals's holding imposing vicarious liability based on a theory of apparent authority accomplishes precisely that result — it imposes an awesome penalty in the absence of the organization having ratified, acquiesced in, or even having known of, the illegal activity.

(2) Moreover, in the day-to-day workings of the professional societies of the country, a rule of "apparent authority" will be hopelessly difficult to administer. Standards-developing organizations are obligated to accord private due process by other precepts of antitrust law in carrying out the development and approval of technical standards. *See, e.g., Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Accordingly, ANSI's constituents encourage the widest range of notice and comment on standards, including interpretations of their application to specific products, from both members and non-members alike. Comments relating to both proposed and

existing standards by committee members may appear on the letterhead of the committee, an employer, an autonomous local chapter of a constituent professional society, or personal stationery. The very reference to the specific American National Standard itself in correspondence could give rise to an inference that the writer somehow speaks for the organization that published the approved standard. The requirement of open participation in all phases of standards activity is in natural tension with a rule of liability that necessitates a determination whether a member is, in fact, apparently authorized to speak on behalf of the organization.

(3) Antitrust liability predicated upon a rule of apparent authority is unworkable for an additional reason. The very essence of the voluntary consensus process is to bring together divergent economic and technical viewpoints on specific issues of standardization, such as appropriate levels of safety or product performance. It is therefore inevitable that opinions will be expressed that tend to reflect adversely on the products, the technology, or the safety levels advocated by others that are the subject of comments on which opinions are sought. The significance or weight of an adverse comment, however, is in direct proportion to the reputation and objectivity of the commentator. Since the consensus system, with open membership and open participation by all affected parties, clearly includes those with adverse economic interests — buyers and sellers and competing sellers, among others — it is obvious to the immediate participants that the opinions expressed often reflect the economic interests of the commentator. In such an open system, however, it is unreasonable to hold ANSI's constituent members liable for failure to discover and control any improper or illegal motives or affiliations of individuals intent on compromising the system.

It is simply not adequate for the Court of Appeals to suggest that more comprehensive internal review procedures could eliminate the kinds of misconduct engaged in by the

disloyal members in the *Hydrolevel* case.* It does not take a resourceful mind to envision situations in which one person bent on advancing his own aims may use the organization as a vehicle for such ends. For precisely that reason, other Courts of Appeals have rejected the "apparent authority" approach to vicarious liability in more traditional spheres of antitrust law. *See, e.g., United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227, 235 (8th Cir. 1942). If commercial enterprises and unions are not expected to live up to such a standard, it defies reason to impose such a burden upon voluntary, non-profit organizations. This is so if for no other reason than that individuals are not as readily "controlled" in a voluntary setting as they may be in a corporate setting where they earn their living.**

* * * * *

If left to stand, the decision below could undermine the national voluntary standards system, dependent as it is upon the cooperation of innumerable organizations and individuals. The chilling effect of vicarious liability based upon the elusive concept of apparent authority is particularly grave to those smaller standards-developing associations unable to absorb a huge judgment. At the very least, it can fairly be said that the issue whether to impose the sanction of treble damages upon voluntary organizations without the organization's knowing participation, acquiescence in, or benefit from, a conspiracy, is worthy of this Court's review.

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* The improper conduct can in no way be viewed as symptomatic of a defective system. ANSI is not aware of any other case charging unintentional participation in an antitrust conspiracy by a voluntary professional society. ANSI itself has never been made a party to an antitrust action.

** Of course, it is not suggested that individuals who engage in conduct violative of the antitrust laws should be absolved of any liability. The concern here is in attributing such conduct to the organization where the organization has not ratified the illegal activity or benefited from it.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition filed by ASME, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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